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Dhera v Education Labour Relations Council and Others (2009) ZALC 99

JUDGEMENT: NYATHELA AJ

Introduction

This is an application for review of a ruling in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA). The ruling was issued by the ELRC. In terms of the ruling, second respondent found as follows:

- That the Education Relation Council has no jurisdiction to entertain this matter as there is no issue of unfair labour practice since applicant was never an employee of the respondent;
- The applicant can either approach the CCMA or the Labour Court for alternative relief;

The facts

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The applicant in response to an advert by the Gauteng Department of Education applied for a position of a teacher at the Metropolitan Raucall School. The advert indicated it was a Department of Education appointment. Applicant attended an interview for the above position and was advised by fifth respondent that his interview was successful.

On 15 August 2005, applicant completed an application for a temporary appointment as educator form and a notice of temporary appointment form. On the last page of the notice of appointment form below the applicant's signature there is a note reading as follows: "Urgent: Educators are not allowed to assume duty without the written permission of the district manager".

Applicant commenced employment at Metropolitan Raucall School on 22 August 2005. On 26 August 2005, the headmaster informed him that the Gauteng Department of Education had declined to approve his appointment in that he was previously dismissed by the Department as an educator and that as a result of the dismissal, he was blacklisted. According to the respondents, the offer of employment was conditional upon approval of appointment by the third respondent.

Applicant referred a dispute of unfair labour practice relating to "refusal to appoint" to the Education Labour Relations Council (ELRC).



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Point *in limine*

At the arbitration hearing, third respondent raised a point *in limine* and stated that the ELRC had no jurisdiction to hear the matter as no employment relationship existed between the applicant and the respondent. The finding by the second respondent was that the ELRC “has no jurisdiction to entertain this matter as there is no issue of unfair labour practice since the applicant was never an employee of the respondent and that applicant was blacklisted on the persal system. It is this ruling of the second respondent which applicant seeks to review and have it set aside.

Legal position

Rule 14 of the Rules of the CCMA provides that: “If it appears during conciliation proceedings that a jurisdiction issue has not been determined, the commissioner must require the referring party to prove that the Commission has the jurisdiction to conciliate the dispute through conciliation”.

Rule 22 of the Rules of the CCMA provides that: “If during the arbitration proceedings it appears that a jurisdictional issue has not been



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determined, the commissioner must require the referring party to prove that the Commissioner has jurisdiction to arbitrate the dispute”.

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC), the court held that in reviewing an arbitration award, the test should be whether “...having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach.”

Analysis

According to applicant, the second respondent should not have dealt with the question whether applicant was an employee or not but should have confined himself to the fairness of applicant’s alleged dismissal or non-appointment. As pointed out above, Rule 14 and 22 of the Rules of the CCMA which deal with conciliation and arbitration proceedings respectively require that if a jurisdictional point is raised during conciliation or arbitration proceedings, or if the commissioner on his own accord realises that a jurisdictional issue has not been dealt with, he should require a party alleging that the commission has jurisdiction to prove the said jurisdiction. These rules apply equally to proceedings before the ELRC.



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The court held that it is settled law that Labour Law and the Labour Relations Act only apply to the relationship between employer and employee. It follows therefore that the question whether a person is an employee or not, is a jurisdictional issue.

The court held that it was satisfied that the arbitrator acted correctly by dealing with the jurisdictional issue which had been raised before him. It would have been improper for the arbitrator to proceed and deal with the merits of the case before dealing with the jurisdictional issue.

However, the court has to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach given the materials before him at the time of making the decision.

In this matter, applicant signed the Notice of Appointment Form which clearly stated that he should not commence employment until he obtained written permission from the District Manager i.e third respondent. Applicant was therefore fully aware that his employment would be conditional on the third respondent granting him written permission to commence teaching.



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Third respondent did not grant applicant permission and thus the conditional employment terminated due to the non-fulfilment of the condition. Since the offer of employment was conditional, and the condition not having been fulfilled, applicant cannot be regarded as an employee.

The court therefore found that the conclusion reached by the second respondent in the circumstances is not one which a reasonable decision maker could not have reached. In the light of the above analysis, the panellist's ruling that the ELRC has no jurisdiction stands.

